

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

GEORGE CUMMINS,)	
)	
Petitioner,)	Case No.
)	
vs.)	
)	
IOWA UTILITIES BOARD,)	George Cummins' Emergency
)	Motion for Stay
)	
Respondent.)	

1. Petitioner respectfully moves pursuant to Iowa Code 17A.19(5)(c) for an order staying proceedings overseen by the Iowa Utilities Board ("Board"), known as In Re: Summit Carbon Solutions, LLC, Docket Number HLP-2021-0001.

2. This Motion is filed on an emergency basis.

INTRODUCTION

3. On June 21, 2023, Mr. Cummins filed a Motion to Dismiss, on the basis that the Board has no jurisdiction pursuant to Chapter 479B of the Iowa Code over pipelines carrying carbon dioxide in the supercritical phase. On July 28, 2023, the Board issued an Order denying Mr. Cummins' Motion to Dismiss.

4. On August 11, 2023, Mr. Cummins filed with this Court a Petition for Immediate Review of the Board's Order. Any further proceedings of the Iowa Utilities Board should be stayed pending the outcome of Mr. Cummins' action in this case.

5. A motion for stay was also filed with the Board on August 14, 2023. To date, the motion for stay has not been ruled on. Given that evidentiary proceedings in the Board's docket are already underway, it is certain that the Board will not act on the motion.

REQUIREMENTS FOR ISSUING A STAY

6. 199 I.A.C. § 199.7.28 establishes the procedure for staying Board action pending judicial review. That rule provides that in determining whether to grant a stay, the

board shall consider the factors listed in Iowa Code § 17A.19(5)(c). Those factors, which must be balanced, are:

1. The extent to which the applicant is likely to prevail when the court finally disposes of the matter.

2. The extent to which the applicant will suffer irreparable injury if relief is not granted.

3. The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.

4. The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

7. The applicant “has the burden to establish the prerequisites for a stay and must submit evidence to the district court concerning all relevant statutory factors at a hearing.” *Grinnell Coll. v. Osborn*, 751 N.W.2d 396, 403 (Iowa 2008). The applicant need not show that he will eventually prevail in judicial review, but the court will consider the extent or range of the likelihood of success. *Id.* at 402. Proof of one factor can excuse another that is lacking and ultimately, the stay can be granted when the balance of hardships weigh in favor of the applicant. *Id.*

8. Furthermore, in evaluating the factors, in cases involving the administration of regulatory statutes designed to promote the public interest, the interest of private litigants must give way to consideration of the public interest. *Teleconnect Co. v. ICC*, 366 N.W.2d 511, 513 (Iowa 1985). In considering harm to other parties in the proceeding, loss of revenue does not amount to irreparable harm. *Id.* at 514.

ARGUMENT

9. Based on the four factors set forth above and the facts of this case, this Court should issue a stay of further proceedings pending resolution of Mr. Cummins' Petition for Immediate Review.

Likelihood of Success on the Merits

10. Iowa Code Chapter 479B is titled "Hazardous Liquid Pipelines and Storage Facilities." Section 479B.2(2) defines "hazardous liquid" as "crude oil, refined petroleum products, liquefied petroleum gases, anhydrous ammonia, liquid fertilizers, **liquefied carbon dioxide**, alcohols, and coal slurries." (emphasis added). Thus, the IUB has jurisdiction only over pipelines carrying hazardous liquids as defined in § 479B.2(2).

11. Summit has stated unequivocally and repeatedly that the carbon dioxide proposed to be transported in its pipeline will be in a supercritical phase. Carbon dioxide is at supercritical phase when it is above 88 degrees Fahrenheit and 1,073 pounds per square inch pressure. Carbon dioxide in a supercritical state is not a liquid.

12. Mr. Cummins filed a Motion to Dismiss Summit's petition for a permit before the IUB, stating that the IUB lacked subject matter jurisdiction over Summit's petition because Summit's pipeline would not be a hazardous liquid pipeline. Mr. Cummins supported his motion with the sworn declarations of two chemical engineers, Richard Kuprewicz and Jasper Hardesty, both of whom gave their expert opinions that supercritical carbon dioxide is not a liquid. Those affidavits are attached to the Petition for Immediate Review filed in this case as Attachments #1 and #2.

13. On July 28, 2023, the IUB issued an Order denying Mr. Cummins' Motion to Dismiss. That Order made the following legal and factual errors that provide grounds for relief:

a. The IUB erroneously determined that the term “liquified carbon dioxide” includes carbon dioxide in a supercritical state and that it includes carbon dioxide in a gaseous state. But in making that determination, the IUB ignored the plain meaning of the word “liquify,” which means “reduce to a liquid state” or “to become liquid.” Merriam-Webster’s Collegiate Dictionary, 10th Edition. In short, the plain meaning of the statute is that carbon dioxide must be in a liquid state and not a gas or supercritical fluid state.

b. The IUB Order ignored the opinions of Mr. Cummins’ expert witnesses in reaching its conclusion. Those witnesses explain in detail why supercritical carbon dioxide is not the same as liquid or liquified carbon dioxide.

c. The IUB Order relied on a standard, B31.4, promulgated by the American Society of Mechanical Engineers (ASME), which the IUB claims was incorporated by reference in the regulations of the Pipeline and Hazardous Materials Safety Administration (PHMSA). That standard is behind a pay wall on the Internet and cannot be accessed to verify its contents or the context of the small paragraph cited by Summit.

d. The IUB Order asserts that PHMSA regulations have supported the ASME definition that supercritical carbon dioxide is a liquid. That assertion is not correct. PHMSA rule 49 C.F.R. § 195.2 defines carbon dioxide as “a fluid consisting of more than 90 percent carbon dioxide molecules compressed to a supercritical state.” That same section then defines, as a separate substance, hazardous liquid as “petroleum, petroleum products, anhydrous ammonia, and ethanol or other non-petroleum fuel, including biofuel, which is flammable, toxic, or would be harmful

to the environment if released in significant quantities.” Additionally, PHMSA rule 49 C.F.R. § 195.4 states:

No person may transport any hazardous liquid **or** carbon dioxide unless the hazardous liquid **or** carbon dioxide is chemically compatible with both the pipeline, including all components, and any other commodity that it may come into contact with while in the pipeline. (emphasis added).

It is clear, therefore, that contrary to the IUB’s assertion, PHMSA does not treat supercritical carbon dioxide as a hazardous liquid. The PHMSA regulations make a clear distinction between the two. Nor has PHMSA incorporated the alleged ASME definition of hazardous liquid, as claimed by the IUB. PHMSA rule 49 C.F.R. § 195.3(c)(4) incorporates ASME standard B31.4 only as to rules 195.110 and 195.452(h). It is clear from reading those rules that standard B31.4 applies to all pipelines and does not rely on the alleged ASME definition of hazardous liquid. In fact, § 195.452 specifically says it applies to “each hazardous liquid pipeline **and** carbon dioxide pipeline that could affect a high consequence area.” (emphasis added). So, again, PHMSA makes a distinction between hazardous liquid and supercritical carbon dioxide.

e. The IUB Order also relied on a scientific article titled *Extraction of Lignocellulosic Materials from Waste Products*. This article allegedly says that supercritical fluid can be either liquid or gas. But this article is also behind a pay wall so it cannot be accessed by Mr. Cummins or other parties in the IUB proceeding, preventing them from determining what the article actually says or determining the context in which the alleged quote appears. Relying upon evidence behind a pay wall and not available to the parties is a violation of Iowa Code § 17A.12(4) which

provides “Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved...”

f. Neither Summit nor any of the parties in the contested case proceeding submitted the article titled *Extraction of Lignocellulosic Materials from Waste Products*. Thus, the IUB appears to have conducted its own research using the Internet, while ignoring the sworn testimony of Mr. Cummins’ experts and the clear distinction between hazardous liquid and supercritical carbon dioxide in the PHMSA regulations. This violates Iowa Code § 17A.12(8) which provides that “Findings of fact shall be based solely on the evidence in the record and on matters officially noticed in the record.”

g. “Procedural rules relating to contested case proceedings are in place to ensure that a party to an administrative hearing is afforded due process, i.e., that the party is given adequate notice and an opportunity to defend concerning the action of an agency.” *Mauk v. State Dept. of Human Services*, 617 N.W.2d 909 (Iowa 2000). The presiding officer in a contested case has a duty to develop the record fully and fairly. See *Baker v. Employment Appeal Bd.*, 551 N.W.2d 646, 648 (Iowa App. 1996). By relying on evidence outside of the record and evidence behind a paywall, the IUB denied Petitioner his due process rights as established in the Iowa Administrative Procedure Act (APA). See Iowa Code § 17A.12; see also *Christiansen v. Iowa Bd. of Educ. Examiners*, 831 N.W.2d 179, 191 (Iowa 2013) (explaining that Iowa Code does not permit a reviewing court “to consider evidence the parties failed to present before the agency when the matter is a contested case” (cleaned up and citations omitted)).

h. The IUB Order asserts that because the definition of hazardous liquid in § 479B.2 includes coal slurries, the legislature intended the term hazardous liquid to mean more than just liquids. In making this assertion, the IUB Order relied on the dictionary definition of “slurry.” However, in interpreting the term “liquified,” the IUB did not use the dictionary definition. No reasoning was offered for this discrepancy.

i. The IUB Order relies heavily on a state district court decision from Hardin County, *Summit Carbon Solutions LLC v. Kasischke*, No. CVCV101911 (July 11, 2023). A copy of that decision is attached to the Petition for Immediate Review as Attachment #3. The Hardin County Court’s discussion of the IUB’s jurisdiction over supercritical carbon dioxide pipelines was brief and conclusory. The Court began by erroneously asserting that Mr. Kasischke’s experts in their affidavits did not set out their background, training and experience. The fact is that Mr. Kasischke’s expert affidavits were exactly the same affidavits from Jasper Hardesty and Richard Kuprewicz that were submitted with Mr. Cummins’ Motion to Dismiss. In those affidavits, the witnesses clearly set out their qualifications. Then, without any discussion of the points raised above, or on any other basis, the Court concluded that the legislature must not have meant what it said when it defined the term hazardous liquids in Iowa Code § 479B.2. Finally, the Court cited two federal district court cases involving the Summit pipeline. *Couser v. Shelby Cty.*, No. 1:22-CV-00020- SMR-SBJ, 2023 WL 4420442 (S.D. Iowa July 10, 2023); *Alverson v. Brown Cty.*, No. 3:22-CV03018-RAL, 2023 WL 3764958 (D.S.D. June 1, 2023). But the distinction between supercritical carbon dioxide and hazardous liquids was

not even an issue in those cases. Based on the foregoing, the IUB had absolutely no basis for relying to any extent on the Hardin County case.

14. The IUB's interpretation of the term "hazardous liquid" is not entitled to deference because the IUB does not have statutory authority to interpret the meaning of that term. To the extent the IUB states that it is interpreting the term "liquified carbon dioxide" in Iowa Code § 479B.2(2), the IUB erred in interpreting that term and is not entitled to deference. The Iowa Supreme Court, in *Mathis v. IUB*, 934 N.W.2d 423, 427 (Iowa 2019), explained:

Furthermore, in recent years, we have generally not deferred to IUB interpretations of statutory terms. In *NextEra Energy Resources, LLC v. Iowa Utilities Board*, we held that the IUB's interpretation of the phrase "electric supply needs" as used in Iowa Code section 476.53(4)(c)(2) (2009) should be examined for correction of errors at law. 815 N.W.2d 30, 38 (Iowa 2012). We explained, [S]imply because the general assembly granted the Board broad general powers to carry out the purposes of chapter 476 and granted it rulemaking authority does not necessarily indicate the legislature clearly vested authority in the Board to interpret all of chapter 476. *Id.*; see also Iowa Code § 476.2(1) (2017) (providing that the IUB "shall have broad general powers to effect the purposes of this chapter" and "shall establish all needful, just and reasonable rules, not inconsistent with law, to govern the exercise of its powers and duties").

Likewise, in *Hawkeye Land Company v. Iowa Utilities Board*, we held the legislature had not clearly vested interpretive authority in the IUB over the terms "public utility" and "railroad corporation" as used in Iowa Code chapter 476, again despite the fact that section 476.2(1) grants the IUB "broad general powers to carry out the purposes of chapter 476." 847 N.W.2d at 207, 208 (quoting *NextEra Energy*, 815 N.W.2d at 37).

In *SZ Enterprises, LLC v. Iowa Utilities Board*, we similarly concluded the IUB was not entitled to deference in its interpretation of the terms "public utility" and "electric utility" as used in Iowa Code chapter 476. 850 N.W.2d 441, 451–52 (Iowa 2014). There, we noted that "no provision in chapter 476 explicitly grants the agency the authority to interpret the terms," and we found that these terms were not "uniquely within the subject matter expertise of the agency." *Id.* at 451, 452 (quoting *Renda*, 784 N.W.2d at 14).

15. The term “liquified carbon dioxide” and especially the word “liquified” is not “uniquely within the subject matter expertise of the agency.” “Liquified” is a term clearly defined in the dictionary. Therefore, the court should give no deference to the IUB’s interpretation of the statute that contradicts the plain meaning of the term.

16. Based on the foregoing, Mr. Cummins has shown a likelihood of success on the merits.

Irreparable Harm to Mr. Cummins

17. Forcing a party challenging a proceeding to expend time, effort and money to assert his rights when the agency has no jurisdiction to allow that proceeding, is inherently irreparable harm.

Substantial Harm to Other Parties

18. Summit cannot claim substantial harm if a proceeding in which the IUB has no jurisdiction is stayed. Nor can Summit claim economic harm if a stay is issued. Financial loss is not irreparable harm. *Teleconnect, supra*. Furthermore, Summit does not have a permit nor any assurance that it will ever get a permit. So if Summit claims that delay in the proceedings would cause it harm, it is assuming that it will get a permit, without any basis for making that assumption. Irreparable harm cannot be based on hope and speculation.

19. In addition, the North Dakota Public Service Commission, on August 4, 2023, denied a permit for the portion of Summit’s pipeline in South Dakota. The North Dakota portion of the pipeline is crucial to Summit’s project because the proposed sequestration site for the carbon dioxide is in North Dakota. Without the North Dakota pipeline and sequestration site, Summit has not project. Mr. Cummins is credibly informed

and believes it will take at least a year for Summit to attempt to submit a revised application in North Dakota.

Public Interest

20. The IUB's Order denying Mr. Cummins' Motion to Dismiss makes no mention of the public interest, and certainly does not suggest that its decision is in the public interest. With respect to the IUB's authority, Iowa Code § 479B.1 identifies the public interest as implementing "certain controls over hazardous liquid pipelines to protect landowners and tenants from environmental or economic damages" and "to approve the location and route" of pipelines. Although Mr. Cummins asserts that § 479B.1 does not apply to the Summit pipeline, that section does indicate the public interest the IUB should have considered in its Order denying Mr. Cummins' Motion to Dismiss.

CONCLUSION

21. Based on the foregoing, this Court is requested stay further proceedings in this case pending resolution of Mr. Cummin's Petition for Immediate Review.

Respectfully Submitted,
George G. Cummins, Petitioner

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Certificate of Service

On September 12, 2023, the foregoing was filed through Iowa Court's electronic filing system, which sent notice to the parties of record.

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